United States
Circuit Court of Appeals
For the Ninth District

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Plaintiff in Error.

vs.

BARTHOLOMEW CHAMBERLAIN,
Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

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STATEMENT OF THE CASE.

(NOTE: For convenience we will refer to plaintiff in error as *defendant* and to defendant in error as *plaintiff*. Italics herein are ours).

This action was brought by Bartholomew Chamberlain against the Chicago, Milwaukee & St. Paul Railway Company, on account of personal injuries alleged to have been received by him on November 15, 1916, in falling from a platform owned by the defendant company, and situated between its main line and a side track, at Herrick, Idaho. The complaint alleged that prior to October 1, 1916 there was, at Herrick, Idaho, a depot and platform constructed between a siding and the main line of the C. M. & St. P. Railway Co., that at that point the tracks were elevated above the natural level of the ground about ten feet, and that the depot was constructed upon posts about ten feet high, and that the platform extended

from the depot building out to the main track, a distance of about eleven feet; that about October 1, 1916 the depot building was removed, but that the platform extending to the main line, being about 11 ft. wide and 80 ft. long, was left, and that the side of the platform where it formerly joined the depot building was elevated above the ground about ten feet. The complaint also alleged that after moving the depot building defendant used the platform for receiving and discharging passengers and their baggage to and from its trains. Negligence on the part of the defendant railway company is charged in that no guard or railing was placed at the edge of the platform where it had formerly been joined to the depot building, and that the platform was not lighted at night. The plaintiff alleged that on November 15, 1916, while waiting for a westbound train, on which he intended to take passage, the plaintiff fell from this platform, sustaining injuries which necessitated his remaining in a hospital from the time of the accident, November 15, 1916, until December 2, 1916, for which he incurred an expense of $150, and that by reason of such injuries. and their permanent and lasting nature, he was damaged in the further sum of $15,000.

The defendant in its answer, after denying all the material allegations of the complaint, alleged that such injuries as the plaintiff sustained were due wholly and alone to the negligence, fault and carelessness of the plaintiff, in that he failed to observe his surroundings, which were apparent to anyone, and that he was well aware of the conditions complained of, or could have been aware of them by the exercise of ordinary

care or by the use of his eyesight and other senses, at the time when he claimed he met with the injury.

The scene of this accident was along the line of the Milwaukee railroad, which follows the St. Joe River, through a deep canyon, where logging and lumbering are carried on extensively, and where the population is chiefly lumberjacks and mill workers, and employees generally in the woods and about the mills. Chamberlain had lived for many years on his claim across the river opposite the siding at Herrick, and had been acquainted with the station siding and grounds from the time the road was constructed. He had witnessed its construction, and all the changes that had been made in the premises. His house was in sight of the station. He was accustomed to cross the river in his canoe and had hauled the little hay which grew on his claim across the river in a canoe and sold it to some one living on the side the station is on. In the forenoon of the day of this accident Chamberlain walked up the track to Marble Creek, and remained at Marble Creek until sometime in the afternoon. During that time it appears that he was drinking more or less. He and a couple other men with whom he had been associating, started down the track in the direction of Herrick sometime in the afternoon, (p. 135-142). In the afternoon of that day two employees of the railroad company, Ernster and Hodges, (p. 135-137) who were "signal maintainers" for the company, started on what is called a speeder, (a little gasoline handcar) down the track from Marble Creek to Herrick, and soon after leaving Marble Creek they came in sight of Chamberlain and his associates, and some one of them flagged the men on the speeder and they stopped and took them on and

carried them down to somewhere in the neighborhood of Herrick. Ernster, one of the signal maintainers, testified: (p. 138)

> "They were all walking down the track and they were all staggering, and they flagged us down and wanted to know if we would carry them down to Herrick, and I thought it best to do so on account of their drunken condition. * * * * I thought it would be best to take them down there, that I was doing the right thing, because it is awful crooked track, and trains come down that hill awful quiet, and if they weren't on the alert they would probably get run over."

These men loafed around in the neighborhood of Herrick and apparently up and down the track until the evening westbound train came along, which was about 5:18 to 5:20 (p. 168). Several persons were gathered on the platform at the Herrick Siding when the train arrived that evening. Some one had brought a box or a trunk and placed it on the platform so that it was at the outer edge of the platform on the side farthest from the track. According to one witness, Chamberlain was sitting on this box when the train pulled in, and as he got up, on the arrival of the train, and started to walk he staggered and fell off the platform. According to his own story, however, he was looking in the direction of the approaching train and as the glare of the headlight from the train struck him in the face and blinded him he started to walk around the trunk, going on the outer side, and stepped off the platform and fell down onto a log or stump below. A depot had previously stood at that place, and had been removed. When the depot was taken away there was no railing placed along the platform at the place where the depot had stood. Chamberlain had been present when the depot was

removed, saw it removed, and had been at the station practically every day since its removal, knew the length and width of the platform, and its height from the ground, and knew that no railing was there, and he had seen the platform and its condition both on the morning and afternoon of the day when the accident occurred, and knew that no railing had been put up, and he also knew that the trunk or box was on the platform and its location. He was more minutely acquainted with all the conditions at that place and had been more intimately acquainted with them from the time the road was built there, than any other single individual, so far as the record discloses. Later on in this brief we will quote at length from the evidence as given by the plaintiff and his witnesses on the question of negligence or the absence of negligence on the part of the railroad company, and showing the action and conduct of the plaintiff, and his own knowledge and neglect, and also the evidence as to the character and nature of his injuries.

SPECIFICATION OF ERRORS.

Defendant specifies and assigns the following errors:

I.

The court erred in overruling the objections of the defendant to the following questions asked the witness LaBranch and in permitting said witness to answer said questions, as follows:

MR. CORKERY: Q. State what statement he (Chamberlain) made in that connection about going to the train.

MR. KORTE: We object as hearsay, as selfserving and incompetent.

THE COURT: Objection overruled. You may have an exception.

Q. What did he say as he shook hands with you?

A. He said he was going on the train with me as far as Plummer Junction.

II.

The court erred in overruling defendant's objections to the following questions asked plaintiff Chamberlain, when on the witness stand, and in permitting said witness to answer said questions, which questions, objections and answers are as follows:

MR. CORKERY: Q. I will ask you if any money was paid to the boys on the speeder, or either of them, that testified here, on account of the passage of yourself or the other men from Marble Creek to Herrick?

MR. KORTE: Objection to this as not on rebuttal. They were bound by the statement of the witnesses when they said that nothing was given to them, and it raises a collateral issue which we are not prepared to meet. It is immaterial. It is on an immaterial issue.

THE COURT: No, I said they had to be bound by the witnesses' statement merely as to the general custom, but as to what occurred at this particular time I think they may rebut that.

MR. KORTE: The issue as to whether or not there was money paid by the men, or by these men, to the men operating the speeder was injected on cross-examination.

THE COURT: The objection is overruled. Exception allowed.

III.

The court erred in overruling, or denying defendant's motion and request for an instructed verdict in favor of defendant, upon the conclusion of the trial and after all the evidence had been submitted in behalf of both plaintiff and defendant; (p. 180)

a. Because the evidence clearly shows, without substantial dispute or conflict, that the plaintiff's injury was the result of a risk of which he was fully aware and of which he had as much knowledge as the defendant, and a risk which he voluntarily assumed, and that said injury resulted in whole or in part from the plaintiff's own reckless misconduct. That plaintiff admitted and so testified that he had been on said platform repeatedly and well knew there was no rail around the same, and that he knew where and at what points said platform was unsafe.

b. Because the evidence clearly shows that the proximate cause of plaintiff's fall from the platform was not the absence of the railing but the result of his stumbling against, or walking around or against, the box or trunk on the platform, and his attempt to walk and move upon said platform after, as he testified himself, he was blinded from the light of the locomotive, and that both his complaint and the evidence discloses that there was no charge of negligence or lack of diligence on the part of the defendant company in maintaining a headlight on the locomotive, or the box or trunk on the platform. The plaintiff admits that he well knew the condition of the platform and that knowing it as he did he attempted to walk around the trunk or box on the far side thereof from the track and on

the unsafe side of the platform while the light from the locomotive was shining in his face.

c. Because the evidence clearly discloses that the plaintiff was guilty of contributory negligence in that he was in a state of voluntary intoxication at the time of the accident, and that the accident resulted primarily from such intoxication and at a time when he was loitering or loafing on said platform and while he was exercising no care or diligence for his own safety and at a time when he admits he was attempting to move in a way that discloses his acts to be grossly negligent and careless. There is no evidence whatever showing that the plaintiff has sustained any damage to his earning powers or his capacity to labor and earn wages or compensation the same now as he could before the accident, and the evidence wholly fails to show that he has lost any time whatever on account of the alleged injury since he left the hospital. There is no scintilla of evidence that he cannot earn as much now at any employment or business he ever follows as he ever could earn, and that no financial loss whatever is shown except his hospital fees and expenses.

d. Because the evidence wholly fails to show any actual or substantial damages, or any continued pain or suffering, or any special damages of any kind excepting the sum of $150 which plaintiff claims to have paid out for medical aid and hospital charges, and the amount of the verdict returned is without support in the evidence and clearly discloses prejudice, bias and passion and a lack of unbiased and deliberate judgment upon the part of the jurors. That the excessive character of said verdict, unsupported by any evidence of plaintiff's occupation or business, or loss of wages or earning power, discloses

on its face prejudice, passion and bias on the part of the jury against defendant, and that the excessive character of said verdict and the prejudice and bias of the jury was impliedly if not directly and positively noticed by the court in making its order herein conditionally denying defendant's petition for a new trial.

e. Because there is no evidence in the record, and there was no evidence given which will support or justify the verdict herein, or any verdict against the defendant for any sum whatever.

f. Because the overwhelming weight of the evidence discloses, and is to the effect that the plaintiff, at the time he went upon the platform where he claims to have been injured, was not an intended passenger but was a trespasser, and was not entitled to the rights of a passenger.

IV.

The court erred in denying defendant's petition for a new trial for the reason that there is no substantial evidence to support the verdict and the verdict discloses prejudice, bias and passion on the part of the jury against defendant, in that there was no evidence whatever showing any loss to plaintiff of wages or earning power or any employment in which plaintiff was engaged or any wage or salary he was receiving, and that the excessive character of the verdict itself disclosed prejudice and passion of the jury and was impliedly recognized by the court in conditionally granting a new trial unless plaintiff consented to a reduction of the judgment one-third, or $2,500.00.

ARGUMENT.

SPECIFICATIONS OF ERROR I AND II.

The statement made by plaintiff before he *became a passenger and in the absence of any agent or representative of defendant, and before he had purchased a ticket or paid any fare, and while he was either a trespasser or at most a mere invitee* upon defendant's platform was the merest hearsay and purely selfserving and obnoxious to all recognized rules of evidence. See page 84 of the transcript.

The testimony of plaintiff (p. 174, 176) to the effect that some one paid the "signal maintainers" a certain sum for allowing plaintiff and his companions to ride on the speeder was not only erroneous but it was grossly prejudicial and could have had no other effect than that of prejudicing the jury. What possible connection could there be between plaintiff riding on this speeder and some one paying the man in charge a half dollar and the alleged falling from a station platform some distance away, several hours thereafter;—and certainly the acceptance of fifty cents for the service, if that was actually paid, could in no way bear on either the competency or veracity or credibility of the witness. *Its only effect could be to prejudice the jury.*

SPECIFICATIONS OF ERROR III.

Under this specification we shall discuss the insufficiency of the evidence to support the verdict and in doing so will call the court's attention to the failure of the evidence to show (a) any negligence on the part of defendant, and (b) the failure of the evidence to show any permanent injury or damage by the loss of salary, wages or earning power or any permanent or lasting disability, pain or suffering by plaintiff. We shall

likewise point out and consider (c) that plaintiff had full knowledge of all the conditions and surroundings and had known them at all times since the platform was constructed, and that (d) he knew the trunk was on the platform, and knew the width and condition of the platform and its elevation above the surface of the ground, and (e) that his own testimony shows that he was guilty of such negligence himself as was both in fact and law the direct and proximate cause of the injury.

DEFENDANT EXERCISED "ORDINARY CARE" AND PLAINTIFF WAS GUILTY OF NEGLIGENCE.

The accident complained of did not occur while plaintiff was a passenger. It happened on the platform before he had become a passenger and *at a place and time* where and when the company owed him the duty of only *ordinary care* such as the grocer or butcher owes his customer while in his place of business.

The railroad company owed to plaintiff the exercise of only "ordinary care," that is, such care as a "reasonably prudent person under the same circumstances" would exercise.

Elliott on Railroads, Vol. 4, at Sec. 1590, states the rule as follows:

> "A railroad company is under a duty to exercise ordinary and reasonable care to so construct and maintain station buildings, or depots and appurtenances, that they shall be safe for use by passengers. The duty respecting the construction and maintenance of station buildings is not so rigorous as that imposed upon railroad carriers in relation to roadbeds, tracks, cars, appliances, and the like. Some of the cases seem to lose sight of the difference between the duty respecting station buildings and that respecting means and modes of conveyance, but the well-reasoned cases recognize the distinction and affirm that a railroad company that exercises ordinary

care in constructing and maintaining station buildings and appurtenances in a reasonably safe condition for use is not guilty of negligence."

The trial court instructed the jury in the present case in line with the foregoing rule. (Trans. p. 186-187).

The Supreme Court of Arkansas in Chicago, R. I. & P. Ry. Co. v. Owens, 177 S. W. 8 quotes the foregoing text from Mr. Elliott with approval and says:

> "The steps of the train constitute a part of the appliances for the accommodation of passengers boarding and debarking, and the rule of care is the same as if the train was in actual motion; the reason being that the passenger is at that time within the entire control of those who are responsible for the handling of the train. Such is not the case, however, *when a passenger is out on the platform, and is merely seeking to board the train, and the rule in those cases is that only ordinary care is required; or, in other words, such care as can be measured by the conduct of a reasonably prudent person under the same circumstances.*"

The Supreme Court of the United States in Atchison, T. & S. F. Ry. Co. v. Calhoun, 213 U. S. 1 (53 L. Ed. 671), speaking through Mr. Justice Moody has said:

> "Leaving entirely out of view, then, the original carelessness of the defendant, we come to the real issue, which was submitted to the jury, upon which alone its verdict can stand. Was the company guilty of negligence in leaving the truck in a dangerous position and not having the depot platform properly lighted, and did that condition directly and proximately cause the injury?
>
> It cannot be doubted that the conduct of Jones was careless in the extreme, though doubtless the motives which impelled him were good. But it is urged that Jones' negligence concurred with the negligence of the defendant in leaving the truck where it did, and that therefore both are responsible for the consequences. There is no doubt that the act of Jones and the act of the defendant with respect to the track concurred in causing the injury, and

we assume that, if the defendant failed in its duty by leaving the truck at the end of the wooden platform, the verdict can be sustained. Washington & G. R. Co. v. Hickey, 166 U. S. 521, 41 L. Ed. 1101, 17 Sup. Ct. Rep. 661. It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there. But, even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that, '*if men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all.* The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.' Pollock, Torts, 8th Ed. 41.

In judging of the defendant's conduct, attention must be paid to the place where the truck was left. If it had been left where the passengers were at all likely to get off or on the train, and a passenger stumbled over it to his hurt, there could be no doubt of the liability of the railroad. On the other hand, if it had been left a mile from the station, where, by no reasonable hypothesis, passengers would attempt to get off or on the train, there could be no doubt that the railroad would not be responsible in such a case. There was a wooden platform by the track at the station, 100 feet, more or less, in length. The truck was left at the very end of this platform, with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidity; much less that a person would take a helpless infant, and, while thus

> running, attempt to place it on the train. We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence. For these reasons the judgment must be reversed."

Applying to the instant case the thought of Justice Moody in the foregoing case, we make the parallel inquiry here: By what degree of human foresight could defendant have anticipated or foreseen that plaintiff would come upon its platform at Herrick and see a trunk standing on the outer side of the platform approximately ten feet from the railroad track, and when the train was pulling into the station and while the "glare of the headlight from the engine was blinding his eyes" he would try to walk around the trunk on the farther side from the track and step off the platform? *It was possible, but it was certainly not a probability which the average man would think to guard against.*

The rule is well stated in St. Louis, I. M. & S. Ry. Co. v. Woods, 131 S. W. 869, as follows:

> *"The exercise of ordinary care is the measure of the duty of a public carrier to protect passengers while at stations.* Hutchinson on Carriers, Sec. 935, 941; 3 Thompson on Negligence, Sec. 274, 278; Huddleston v. Railway Co., 90 Ark. 378, 119 S. W. 280; Railway Co. v. Wilson, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74; Railway Co. v. Barnett, 65 Ark. 255, 45 S. W. 550. The higher degree of care is exacted only during the time in which the passenger has given himself wholly in charge of the carrier—while on the train or getting on or off, for then only is the passenger subjected to the peculiar hazards of that mode of travel, against which the carrier must exercise the highest degree of skill and care. Falls v. S. F. & N. P. Ry. Co., 97 Cal. 114, 31 Pac. 901. But when those extraordinary hazards have ceased, or before they have begun, the degree of care is relaxed as the necessity for it ceases."

It seems evident to us that *plaintiff was guilty of negligence in attempting to pass around the trunk* on the far side of the platform from the railroad track at the time the light "blinded" him. It has been held by the courts in several cases that a person was guilty of negligence who continued to operate an automobile or street car while his eyes were blinded by a glaring or dazzling light from a lamp or headlight in front of him.

In Jaquith v. Worden, 132 Pac. 33, 73 Wash. 349, 48 L. R. A. (N. S.) 827, the supreme court of Washington was considering a case where a person had been injured by an automobile that was driven by a person at a time when he was "*blinded by the rays of the headlight of an approaching street car.*" The court in passing upon the question of the driver's negligence under the circumstances said:

> "The court was not required at its peril to segregate and define with all its limitations each circumstance which may or may not have contributed to the injury. This is particularly true in the light of Wade's testimony. He said that he was so blinded by the rays of the headlight of the approaching street car that he could not see ahead; that he could not have seen a person, and that he did not see the machine until he struck it; that he was then thrown from his seat, his foot striking the lever, causing the car to increase its speed. Under his own testimony he was guilty of most pronounced negligence. He was proceeding in utter disregard of the presence of other travelers or objects ahead of him. Had he been without eyes or had he closed them, he would have been in no worse position. To proceed at all in the face of those conditions was at his peril."

In the very recent case of Foster v. Cumberland County Power & Light Co., 100 Atl. 833, L. R. A. 1917E 1044, the supreme court of Maine was considering an accident caused

by a street car while "the eyes of the motorman and his companion were so blinded by the lights of an approaching automobile that they were unable to see anything in front of them," and "the motorman at once shut off his power, rang his gong and allowed the car to coast at a speed of six or eight miles per hour." When the motorman's eyes recovered their power of sight, he saw for the first time a wagon in front of him partly on the track, and before he could stop the accident occurred. Referring to this part of the case the court said:

> "Upon this evidence we conclude that the defendant, although apparently doing all within its power to stop the car on perceiving the wagon, was negligent in not reducing the speed to the slowest possible rate or, better, stopping the car altogether, immediately the eyesight of the motorman was affected."

Some recent decisions are cited in the note to the foregoing case at pages 1045 and 1046 of L. R. A. 1917E, holding to the same effect as the main case.

In the recent case of Hammond v. Morrison, 100 Atl. 154, the New Jersey court was considering the conduct of the driver of an automobile who failed to stop his car when he was temporarily blinded by the reflection of street lights upon the wind shield of his car, and as a result thereof the conductor of an approaching street car was killed. The court among other things said:

> "No man is entitled to operate an automobile through a public street blindfolded. When his vision is temporarily destroyed in the way which the defendant indicated, it is his duty to stop his car, and so adjust his wind shield as to prevent its interfering with his ability to see in front of him. The defendant, instead of doing this, took the chance of finding the way clear, and ran blindly into the trolley car behind which the decedent was standing. Hav-

ing seen fit to do this, he cannot escape responsibility if his reckless conduct results in injury to a fellow being."

The same principal as announced in the foregoing authorities is upheld in Spoatea v. Berkshire St. R. Co., 99 N. E. 467, 212 Mass. 599, 42 L. R. A. (N. S.) 876, and in Gliddon v. Bangor R. & Electric Co., 92 Atl. 185.

In Buzick v. Todman, 162 N. W. 259, the supreme court of Iowa held a person guilty of negligence for continuing on his way and causing an accident who testified that the lights of an automobile dazzled his eyes so that he could not see objects in front of him, and held that it was his duty to have stopped his car or vehicle until he could see, or the cause of his being blinded was removed.

In line with the foregoing authorities we maintain that it was gross negligence of plaintiff, to attempt to pass around the trunk while the headlight from the locomotive was blinding his eyes.

If it be granted, for the sake of argument, that defendant was negligent in not maintaining a rail along the back side of the platform, still defendant could not have *reasonably foreseen* that some one would *place a trunk on the back edge of the platform* and that plaintiff or any one else would attempt to walk around *back of the trunk* with the *headlight of a locomotive* at the same time *blinding his* eyes.

> "According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a *possible* consequence, but whether it was *probable;* that is, *likely to occur, according to the usual experience of mankind. That this is the true test of responsibility, applicable to a case like this, has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience."*

(Stone v. Boston & A. R. Co. 51 N. E. 3).

In Kelley v. Manhattan Railway Co. 20 N. E. 383, Justice Peckham comments upon the various degrees of care and diligence the carrier owes to its passengers particularly while the passenger has absolute control of himself, as distinguished from such time as the company has control over him. The court says:

> "The rule in relation to the liability of railroad corporations for injuries sustained by passengers under such circumstances as this case develops differs from that which obtains in the case of an injury to a passenger while he is being carried over the road of the corporation, and where the injury occurs from a defect in the roadbed, machinery, or in the construction of the cars, or where it results from a defect in any of the appliances such as would be likely to occasion great danger and loss of life to those traveling on the road. The rule in the latter case requires from the carrier of passengers the exercise of

> the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such a case is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance. As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accident. See Hegeman v. Railroad Corp., 13 N. Y. 9. But in the approaches to the cars, *such as platforms, halls, stairways, and the like, a less degree of care is required;* and for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain to are naturally of a much less serious nature, the rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended. We have lately had cases of this character before us, and in the case of Lafflin v. Railroad Co., 106 N. Y. 136, 12 N. E. Rep. 599, where a passenger was injured in stepping from a car onto the platform, because, as he alleged, the platform was too far from the steps of the car, this rule was announced, (opinion per Earl J.:) *'The company was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient, and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted.'* "

In Falls v. San Francisco & N. P. R. Co. (Cal.) 31 Pac. 901, plaintiff while about to take the train stumbled over an obstacle on the station platform, later found to be a milk can, was injured and claimed the defendant company was negligent in providing an unsafe station platform. The court discussed the question of diligence on the part of the railroad company in maintaining its station platforms as follows:

> "In Thompson's Carriers of Passengers it is said, (page 104) 'The carrier's liability in respect of the condition of his premises is neither greater nor less than that of any person to another, who by invitation or in-

ducement, express or implied, has come upon his premises for the purpose of transacting business. *A duty of protection is owed to such persons by the carrier, but it is needless to remark that this does not amount to a warranty of the safe condition of the premises; neither is the carrier held bound to bestow upon their condition that extraordinary degree of vigilance which the law, from motives of the soundest policy, imposes upon him in regard to the carriage of his passengers.* The passenger while in actual progress upon his journey is exposed to countless hazards, gives himself wholly in charge of the carrier. * * * * But a rule properly ceases with the reason for it; therefore, as a passenger's entrance to the carrier's station is characterized by none of the hazards incident to the journey itself, the rigor of the rule above announced is justly relaxed, in that at such a time and place the carrier is bound to exercise only a reasonable degree of care for the protection of his passengers.' Penn. Co. v. Marion, 104 Ind. 242, 3 N. E. Rep. 874. *'The rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended.'* Kelly v. Railroad Co., 112 N. Y. 443, 20 N. E. 383. Whether there has been an exercise of such care depends upon the circumstances of the case,—the nature of the road and the character of the traffic and place where the accident occurred. *Thus it has been held that 'at a mere way or flag station, where trains do not regularly stop for the reception and discharge of passengers, and only stop when they are flagged, or to discharge a special passenger, a passenger need not expect or rely upon the company's having furnished a platform or other convenient place for the reception and discharge of passengers.'* "

Herrick was only a *flag station* and no agent was kept there (p. 170, 45) so that it would clearly not have been negligence on the part of the Company had it not maintained any platform at all at that station. (2 Hutchinson on Carriers. Sec. 929). No complaint is made of this platform except that there was no railing along the far side from the track.

In Western Union Telegraph Co. v. Catlett, 177 Fed. 71, at page 77, the case of Atchison R. R. Co. v. Calhoun, 213

U. S. 1, 53 Law Ed. 671, is followed and the quotation from Sir Frederick Pollock is applied:

> "The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things."

The Atchison case is again cited, quoted from and followed in Chicago B. & Q. Ry. Co. v. Richardson, 202 Fed. 841.

In Lafflin v. Buffalo & S. W. R. Co., 12 N. E. 599, Justice Earle, speaking for the Court of Appeals of New York, said:

> "There was no evidence that any accident had ever happened at that station before on account of the construction of the platform, or that there had ever been any complaint in reference to it. On the contrary the evidence shows that the platform had been used for many years by men, women, and children, and that no one but the plaintiff had ever been injured, or had suffered any inconvenience, on account of the distance of the platform from the cars. Thousands of men, women, and children must have passed from the cars to this platform in entire safety. Under such circumstances, how can it be properly said that the defendant was guilty of any carelessness in its construction and maintenance? *It was not bound so to construct this platform as to make accidents to passengers using the same impossible,* or to use the highest degree of diligence to make it safe, convenient, and useful. *It was bound simply to exercise ordinary care, in view of the dangers attending its use; to make it reasonably adequate for the purposes to which it was devoted.* In the case of a platform which had always been safe, and answered its purpose for men, women, and children, in all kinds of weather, by night and by day, for many years, what was there to suggest to any prudent person any change or improvement for the purpose of making it more safe or convenient?"

Pennsylvania R. Co. vs. O'Neil (C. C. A.) 204 Fed. 584,

is a case very much in point in the present case. Helen O'Neil, an intending passenger, in stepping back from the ticket office on the wharf, fell over a sign which stood about six feet from the movable ticket office. In disposing of the question of negligence on the part of plaintiff, and the care which the passengers must take in their own protection, the court said:

> "There is no testimony that an accident of any kind had occurred from the use of this sign before. We have not been able to find an authority where such an act has been held to be a fault. The court can take judicial notice of the fact that in railroad stations, theater offices and other similar places, it is customary to place bars and registering turnstiles opposite the office to keep the crowd orderly and in line. It is manifest that if a purchaser suddenly steps back against these structures, he is liable to fall or receive injuries. But the books record no case, so far as we can find, where a party has recovered for injuries so received. *The reason is manifest; the law expects every one entering such places to keep his eyes open and not to stumble over a perfectly obvious obstruction.* The photographs show that the pier in question was occupied by freight, wagons, baggage trucks and many other objects which a blind man might stumble over, but which any one with his senses unimpaired would certainly avoid. *That the sign in question was in plain sight is admitted, that the plaintiff saw it is admitted. To hold that the defendant is responsible because she stumbled over it carries the rule of negligence to such limits that the carrier becomes an insurer of all who are injured while rightfully on its premises.*"

In the case at bar Chamberlain testifies to knowing of the condition of the platform and the lack of a railing, and to seeing it in both the forenoon and afternoon of the same day of the accident.

In St. Louis I. M. & S. Ry. Co. v. Barnett, 45 S. W. 550, the Supreme Court of Arkansas, in discussing the duty a rail-

road company owes its passengers in maintaining a *safe* platform around its station, said:

> "What is that duty? Railroads, according to the decided weight of authority, must exercise ordinary care in providing station platforms that will secure their passengers, in so far as such care can do so, against any injury that may result in the use of them. 1 Fetter, Carr. Pass. Sec. 47; Kelly v. Railway Co., 112 N. Y. 443, 20 N. E. 383; Lafflin v. Railroad Co., 106 N. Y. 136, 12 N. E. 599; Taylor v. Penn. Co., 50 Fed. 755; 4 Elliott, R. R. Sec. 1590, and cases cited; Hutch. Carr. Sec. 521a; Moreland v. Railroad Co., 141 Mass. 31, 6 N. E. 225. Such 'ordinary care' is that which a man of ordinary prudence would exercise under the circumstances to accomplish the end in view, namely, the safety of the passenger. As was said in Banking Co. v. Ryles, 84 Ga. 420, 11 S. E. 499, ordinary care 'is a relative, and not an absolute, term. The degree of care and foresight which it is necessary to use (in any given case) must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against.' * * * * Measured by the law as thus announced, the instruction above quoted was susceptible of misconstruction by the jury, inasmuch as they might have concluded therefrom that the railroad was bound to provide a platform that was absolutely safe."

To same effect see:

Penn. Co. vs. Marion, (Ind.), 3 N. E. 874.

HOW THE ACCIDENT OCCURRED.

Now, keeping in mind the rule of law that must be applied to this case, let us turn to the evidence and see if defendant has been guilty of negligence and if plaintiff used reasonable care while waiting or loitering at defendant's station. Chamberlain, the plaintiff, testified, (pages 47 to 50);

Q. And you walked down the track for about what distance?

A. I walk down the track, it must be pretty near a quarter of a mile, until I met this man.

Q. Then did you return to the depot?

A. We come as far as this bridge. There is a bridge across Big Creek, and we sat there, and to where, if I could hear the train, we feel I could walk fast enought to make that train. We sat there until it must be clost to seven or half past six or seven, until I hear the train coming, and he told me to, this man Robinson, he said, "Bart, I think you had better go; I hear the train," and I said "Yes, I hear it too."

Q. You went on down to the depot?

A. I walk right on down to the depot. Just then the train had come through this tunnel; this tunnel come through there about a mile or better, or somewheres near a mile. Well, then I got to the depot, and I met some of the fellows there, and says, "I am going." "Well, Bart," they said, "I bid you good bye," and I says, "I am going on the same train," and just then the train was coming around, and there was a box or a trunk right on that platform, and as I was coming I just stepped right around to go behind this, so as to catch the train. When they stop there is always a space behind that you have got to go at the other end of the depot, on the east end of the depot. *So then as I went to go around that trunk, some way, I don't know, I just made a step, the same as usual, and off I went, off, and of course I know when my foot missed, I know that I was a goner, but I didn't know where I was going to land.*

Q. Did you fall into this hole you have described?

A. Yes, sir, I fall right in that hole.

Q. Just a minute, Mr. Chamberlain, was there any light,—first I will ask you this,—what was the distance away, in the direction from which the train was coming, that you could first see the light of the train from the depot, about how many feet away?

A. Oh, it might be about three or four hundred yards to where the platform is now, coming kind of around where it strikes this depot,—the flash—

Q. Just a minute. That is to say, there is a curve—

A. There is a curve.

Q. And the distance is what from the curve to the platform?

A. Just about three hundred yards, I suppose; maybe two or three hundred yards, or six hundred feet or nine hundred feet; I don't know just what it could be.

Q. Was there any light came from the train about the time you fell, and, if so, describe that.

A. *Yes. The train was just about making this curve when I stopped to go around this trunk, and a kind of a flash struck me in the face, but I don't know—I will say—*

Mr. Korte: Of course, Your Honor, I want to object to the light; there is no charge of negligence on the ground that the light blinded him, or that these trunks were there. The only charge of negligence is that there was no railing maintained at this particular platform.

The Court: This will be one of the circumstances, is all. Go ahead, you say the light struck you.

A. *Yes, the light struck me and kind of blinded me a*

little bit, and I went to go around. There was neither a guard to protect me or nobody else, and—

Q. Just a minute. Was there any light about the depot, any light that you saw there?

A. No, there is no light of any kind there, outside of the locomotive light.

Q. Is there any light about the depot building or grounds which would in any way light up the platform or this hole or the edge of the platform in any way?

A. No light of any kind, unless a person would come, the trains would be late, and away after night they might bring a lantern to flag the train, is all.

Q. Was there any guard or barrier or any protection of any sort about the edge of this platform next to the hole?

A. No protection, no guard of any kind at that time.

Q. What was the condition of the night, as to being dark or otherwise?

A. Well, being as the train was late, I should judge from the best I know, that train was late, and it was getting dark, it was pretty dark, but how dark of course I wouldn't say. It was a dark night.

Q. At the time the train pulled in what was the condition of the night then?

A. A dark night.

(Page 77)

Q. These boxes and the trunks were the LaBranchs, that they had put there? They were going away, they were going to Salem, Oregon, their old home, weren't they?

A. Yes.

Q. You know that, don't you?

A. Yes, sir.

Q. They were going away for good?

A. Sure. I don't know whether they were going away for good, but—

GREENWOOD;

(Pages 156-157).

A. He was sitting on the trunk when I first noticed him, having words with Frank La Branch.

Q. How near did you go to him then when you heard these words?

A. I didn't come very much nearer. I was thirty feet from him.

Q. Go ahead and tell what happened there when you came up to where he and La Branch were having the words.

A. I come up to within maybe ten feet of him, and the train was coming about half way between the tunnel—

Q. How far is the tunnel from the platform?

A. It is about I should say three-quarters of a mile, a little over three-quarters of a mile. The train was coming near, and I expected my father from Marble Creek on the train, and so I picked up and come down, and I was about ten feet maybe from the trunk, and I turned around, but the headlight had not yet struck the trunk, and I seen Mr. Chamberlain get up, and I would say that he was under the influence of liquor.

Q. How did he act? Just tell the jury, when he got up, just describe how he got up.

A. He was sitting on the trunk, with his back east, facing west.

Q. Which way would that be with reference to where he fell off?

A. It was like if he was sitting on the trunk here, with his back to the headlight, he went cater-cornered and fell off.

Q. How did he act when he got up, with reference to movement?

A. Well, he seemed to be, well, just shaking a little, trembling, like, and he moved sort of sideways, and I seen Mr. Frank La Branch put out his hand. I don't know whether—it was too dark for me to say whether he touched him or hit him, or didn't touch him at all,—and I seen Mr. Chamberlain raise his hands, and then he fell over.

PLAINTIFF'S KNOWLEDGE OF CONDITION OF PLATFORM.

CHAMBERLAIN;

(Pages 62-65)

Q. How many times did you ever get on that train and slow it down, as you say, after you were hurt?

A. How many times?

Q. Yes, sir.

A. Oh, I don't know. I used to go down maybe, when I would be home, I would be running short of medicine, or such as that, and I would go down maybe once a week or such a matter.

Q. How many times before you were hurt did you ever slow that train down and get on?

A. Not only slow down; they would stop.

Q. How many times did that train ever stop for you before you were hurt?

A. Every time I want to go some place, but how many times I never kept track.

Q. Well, give us an idea, Mr. Chamberlain.

A. Every time I travel, but of course I can't say how often, how many tickets.

Q. Did you ever take that train there at that platform after the building was taken away?

A. Yes, sir.

Q. How many times did you take it? How many times did you go there to take it?

A. *I must have been there maybe twenty-five or more times.*

Q. Before you were hurt?

A. Before I was hurt. *Ihad been living there for ever so long.*

Q. I mean now from the time the building was taken away down to the time you fell off that platform, how many times do you claim you stopped the train there and got on?

A. After they moved the depot, I don't think hardly I took the train there more than a few times.

Q. About how many?

A. Maybe two or three different times.

Q. Were you there when the building was moved away?

A. Yes, sir.

Q. You were there on that day, when you saw them moving it?

A. *I didn't say I was there, but I could see right from my home.*

Q. Did you help them load the building on the car?

A. No, sir.

Q. It was loaded onto a car, was it not, and taken to Marble Creek?

A. Yes, it was loaded on a flat car.

Q. And the train that you would take and did take before you were hurt was this No. 17, going west, and due there about five-five or five-three?

A. Yes, due there at five-two.

Q. Now, before you were hurt, and after the building was taken away, can you tell me any place you went to on that train?

A. That I went to?

Q. Yes, sir.

A. I have took the train once for Spokane.

Q. Yes. Then where? Any other time?

A. I don't know where—I might have went, took the train to St. Maries for all I know, and I don't remember—

Q. Did you go east at all?

A. *I might have took the train to go up to Marble to get the mail.*

Q. *That is where you had to get your mail?*

A. *Yes.*

Q. *And get your groceries?*

A. *Yes.*

Q. *And get what you needed for the house?*

A. *Yes, sir.*

Q. Now, this morning when you were hurt, what were you doing there when you got there?

A. The morning I was hurt?

Q. Yes,—where were you in the morning?

A. I was right within maybe two or three hundred yards from where I fell, from the depot.

Q. Were you at your ranch there in the morning, or that night, before you were hurt?

A. I was there the night before, yes.

(Page 80).

Q. *Well, then, you say they never had any railing about this platform since they moved the building away, is that right; they never had put a railing on there from the time they moved the building away until you were hurt?*

A. *No, sir, never had.*

Q. *They never had a railing there?*

A. *Never had a railing.*

Q. *How do you know they never had any railing there?*

A. *I know because I travel often enough right across from my place.*

Q. *You knew that very well, didn't you?*

A. *I knew it.*

If the company had caused some one to go to Chamberlain that evening on his arrival at Herrick Station and tell him that there was no rail along the farther side of the platform from the track and that he must be careful and on the lookout, he could then certainly not have recovered for falling off after such warning. But such a warning would have been a useless thing for the reason the plaintiff testified repeatedly that he

knew when he went on the platform that no rail or guard was maintained, and had known of the condition at all times, and had seen it the morning and afternoon of the accident. The query arises; If a man, knowing a danger and its exact location, can deliberately and without any excuse or impelling cause walk into it and receive an injury and then recover damages therefor?

PLAINTIFF HAD BEEN DRINKING.

CHAMBERLAIN;

(Pages 68-70).

Q. And you had a drink of whiskey when you were there?

A. Oh, well, the boys—I met the boys and they offer me a drink.

Q. How many drinks did you have, Bart, before you started west?

A. I don't think hardly that I had any more than one or such a matter.

Q. And you had a bottle with you?

A. I had no bottle. The boys that invited me to drink, they had a bottle.

Q. How many bottles did you punish before you left?

A. All I seen was a four-bit flask.

Q. How many of you patronized that flask?

A. There might have been five or six.

Q. A pretty good sized flask?

A. A flask.

Q. What do you mean by flask?

A. A four-bit flask, a full pint flask.

Q. And you drank that before you left, with the others?

A. I drank maybe a drink out of it.

Q. You said you had two or three drinks, didn't you?

A. I said I drank one out of it that I know.

Q. Aren't you sure that you took more than one?

A. Oh, well, I might have —

Q. And then you started to go west at what time?

A. Well, I wouldn't say. It must have been about half past one or two, maybe.

Q. And who had this whiskey in the flask?

A. Oh, well, now, I don't know. You know—you meet so many, you know, you don't know who have it; they call you to take a drink, and you don't know who owns that liquor, and I don't know.

HODGES;

(Pages 118-119)

Q. Tell the jury what you saw by way of drinking whiskey, if there was any drunk there, by Chamberlain or the others that he was with.

A. Not right in the Marble Creek Store there, no, sir.

Q. Anywhere about Marble Creek before you started away.

A. Yes, along down toward the right of way I saw a bottle passed around several times among these gentlemen.

Q. Tell the jury whether or not you saw Chamberlain drink from the bottle.

A. Yes, I did.

Q. How often, about.

A. Oh, I can't say; several times.

(Pages 121-122)

A. What they had to drink was some kind of whiskey, I should judge.

Q. What was it in?

A. It was in a flask. I don't know whether it was a pint or a half pint flask.

Q. What did they do with it?

A. They were passing it around and each taking a drink, that is, all except one man.

Q. Who was that, that didn't take a drink?

A. I didn't see him take a drink every time. That was Mr. McDowell.

Q. Did you see Chamberlain take a drink?

A. Yes, sir.

Q. How often?

A. I can't swear to the number of times. I don't know that he refused any time.

ERNSTER;

(Pages 137-138)

Q. Where you saw him around those other men at Marble Creek from 11 o'clock on, tell the jury whether or not you saw Chamberlain drinking whiskey and the other men drinking whiskey with him.

A. Yes, sir.

Q. Tell in your own way what you saw, so that we can get an idea of it, too, what it is to drink whiskey.

A. I seen Chamberlain take a drink as he passed my car on their way walking down the track west. * * * *

Q. And where did you come upon them?

A. Just a short ways west of Marble Creek.

Q. Now tell the jury just how you came upon them there.

A. Well, they were all walking down the track, and they were all staggering, and they flagged us down and wanted to know if we would carry them down to Herrick, and I thought it best to do so on account of their drunken condition.

VERDICT IS RESULT OF PREJUDICE, BIAS, PASSION, OR OTHER IMPROPER MOTIVE.

The verdict in this case *does not and cannot rest on the evidence in the case* but must of necessity rest on the *prejudice and bias of the jury*. It is a verdict founded and returned on *some other basis than the evidence given by the witnesses*.

In any possible light in which the evidence may be viewed the verdict in the case is so palpably excessive and unreasonable as to conclusively establish *either prejudice and bias in the minds of the jurors, or such a misapprehension of the facts proven and the instructions given as would amount to prejudice or passion resulting in a gross disregard of their duties as jurors.*

In either view of the matter a new trial should be granted.

The plaintiff had a life expectancy of only ten years,—if injured half so badly as this verdict would indicate, he could not humanly hope to live out his expectancy. He shows *no loss whatever of earning* power,—*not a word can be found in the record to the effect that he cannot do his gardening as well now as before the accident,* he runs his boat across the river and through the rapids as well. He had not been work-

ing for wages or a salary of any kind,—no complaint is made that he cannot do as much work now as he could do before the accident and the same kind of work he was doing before.

In the face of these facts the jury allow him a sum that if placed at interest at the legal rate in Idaho, (7 per cent) would earn him annually Five Hundred and Twenty Five Dollars, or Forty Three and 75-100 Dollars per month and leave the principal intact at his death.

But since he has no family to provide for, he might use both principal and interest and if he would so apportion it, to use up the entire sum in the same amount each year during his life expectancy of ten years, keeping the principal for the succeeding years at interest until the year in which it would be needed and expended, he would have *One Thousand Twelve and* 50-100 *Dollars to spend each year or Eighty Four and* 39-100 *Dollars per month.* This sum must be paid to a *man taken from no business or industry and whose earning capacity* (barring increased age) *is as great today as it was the day he fell from the defendant's platform.*

In order that this court may readily examine *all the evidence* there is in the case concerning plaintiff's injury, its nature and extent, and his loss of wages, salary or earning power, we are quoting herein the whole of the evidence given on that subject or bearing thereon.

We are so thoroughly impressed with the soundness of our position and the insufficiency of this evidence that we present it here in full so that plaintiff's counsel may answer us in their written brief so that we may know in advance of

the oral argument upon what grounds or theory they would support this verdict.

PLAINTIFF'S BUSINESS AND EMPLOYMENT.

CHAMBERLAIN;

(Page 58)

Q. And what farming do you do on it?

A. Raising garden and hay.

Q. How much hay do you raise?

A. Oh, I got maybe last year, cut about thirteen or fourteen tons.

Q. Where do you sell that hay?

A. Usually sell it right there at home, or feed it out.

Q. Did you sell any of it this year, or last year, last fall or this spring?

A. Sold it all.

Q. How did you get it across the river?

A. Fed it right there at home.

Q. I asked you whether you sold some.

A. Sold it all. They bought it, you know, to feed their own stock right on the place.

Q. On the place where you live?

A. Yes, sir.

PLAINTIFF SUFFERED NO PERMANENT INJURY AND HIS EARNING POWERS WERE IN NO RESPECT IMPAIRED.

CHAMBERLAIN;

(Pages 54-55)

Q. During the time you were in the hospital, Mr. Chamberlain, what was your trouble? How did you feel?

A. When I first—when I was gone—after I come to it

was nothing but pain, and it seemed that my side here was just about to drop to pieces, and the shoulder and the arm which it was that I couldn't move, almost paralyzed, and I felt when I could move it was just like taking knives and running it through my lungs and all through this side; that is the way I felt.

Q. Did you spit up at all?

A. Yes, and I begun to cough and spit, this inflamed blood and so on, and I spit,—the doctor say to me that it was hard for me; he says he can't see where in the world that phlegm and blood and so on comes from. I was spitting there for a week or such a matter a cuspidor like that full twice or three times a day.

Q. Was that blood or what was that you spit up?

A. Blood and phlegm and so on, so that it must show there was something in me to suffer.

Q. What is your condition now, Mr. Chamberlain? What is your condition at this time?

A. Well, I feel pretty—excepting this shoulder, right in the shoulder I can't very well handle it; I can handle it down, but I can't very well use that; and there is a pain, sharp pain, through my lungs when I take a long breath; it is just the same as running needles or knives through me; and right back in my shoulder, in the shoulder blade, there is a pain there that if I walk any distance there is a kind of burning pain, just as though something has been broke or disconnected, to this day.

Q. Do you have any trouble with your shoulder in damp or cold weather?

A. Yes, I notice it a little more at the time, just about raining or such a matter.

Q. What is your condition then?

A. Oh, it is just like running needles, and pain and so on, through this side.

Q. What is the condition of your lungs when you exercise to any extent or move about rapidly?

A. My wind is short; it has never come back.

Q. Is there any soreness or pain in your chest at those times?

A. Yes, when I take a long breath I feel a pain right in my lungs.

(Pages 59-62)

MR KORTE: Q. Did you bring any hay across the river yourself this spring for Higgins or any other man?

A. Yes, I brought it for Higgins.

Q. Did you bring it across the river?

A. Yes, but—

Q. How did you get it across?

A. In a boat.

Q. In this boat that you say you poled across?

A. Yes.

Q. How many bales would you have in that boat at a time?

A. I didn't have no bale; I would just bundle it up and take whatever the boat would hold.

Q. And then you would pole it across the river?

A. It is mostly paddling from down below, where I get the hay from.

Q. Did you have to paddle your boat up the river then to come across to where you were going?

A. Yes.

Q. How many trips did you make there to get that hay across.

A. I might have made about two or three trips.

Q. That is swift water there, isn't it, in the St. Joe?

A. Kind of slack water there. It is a long ways between the riffles there; it ain't all swift, you know.

Q. You said you had to pole your boat across instead of paddling, in your direct examination, isn't that so?

A. From my home to the depot, I had to come through swift water, but to where I took the hay, I could almost paddle back and forth.

Q. But when you come from your home over to this little station, when you want to take the train, you have to pole your boat through the swift water?

A. I have to pole the swift water, rapids.

Q. How many times a week would you make that trip?

A. Where?

Q. From your house to the station.

A. Oh, well, if I have nothing to do I might go maybe once a day, and in the summer when I am doing nothing I might go for the mail, and go and get a paper off of the train, or such a matter, maybe once, maybe twice a day,—I don't know.

Q. How often have you gotten a paper off of the train down to date, since you were hurt?

A. Since I am hurt?

Q. Yes, how many times did you ever get a paper off of the train?

A. Well, there was for a long time there I used to get a paper, when I was at home, I used to get a paper nearly every day at the time I was home.

Q. So you would cross that river twice a day then by poling.

A. It was in the winter, and you could walk; it was cold.

Q. I am talking about when you had to use the boat.

A. I never used the boat much after I got hurt; there was ice.

Q. This spring did you ever get any papers off of the train, in the spring?

A. This spring, of course, after the ice went away, I would pole up a ways and get a paper.

Q. I want to know how many times you ever got a paper off of the Milwaukee train this spring after the ice went out?

A. I might have got it maybe a dozen times or more.

(Pages 81-82)

MR. CORKERY: Q. Mr. Chamberlain, why did you have to pole across the river there to make the train? Why was it necessary to pole to make the train?

A. At the time that I had to pole?

Q. Why did you have to pole? Why couldn't you paddle?

A. Well, it is swift water, swift water from my place until you get a certain distance, to where I land, and I have to use a pike pole.

Q. How long a pole is that?

A. Oh, that might be ten or twelve feet long.

Q. And you stick that down on the bottom of the river?

A. Yes, and push on that.

Q. What would happen if you paddled across there at that point?

A. You can't very well paddle in swift water.

Q. What would happen if you would attempt to paddle?

A. You would be drifting down and couldn't make no headway.

Q. How far beyond the depot would you land?

A. Just almost across.

Q. But I say if you paddled and didn't use your pole, where would you land at?

A. Oh, you might land away down below.

GREENWOOD;

(Pages 154-155)

Q. How did he get back and forth across the river?

A. In a boat.

Q. How would he operate the boat?

A. You have to take a pike pole.

Q. That is, take a pike pole and pole your boat across the river?

A. Yes.

Q. On account of what,—swift water?

A. Swift water.

Q. Have you seen him poling back and forth since he was hurt?

A. Not from that place, but I have seen him pole the swifter rapids below that place.

Q. Swifter rapids?

A. Yes, sir, directly across from the bridge.

Q. When you speak of the rapids tell the jury what it was.

A. Swift water, running over the rocks.

DR. PLATT;

(Pages 97-100)

A. Well, he had a dislocated right shoulder, and some fractured ribs, and skinned up and bruised up about the head and shoulders and arms.

Q. Just take the shoulder there. Was there any breaking of bones about the shoulder?

A. I think the joint was broken where the bone was dislocated.

Q. State his general condition as to strength or weakness when you examined him, and general bodily vitality.

A. Well, of course, you couldn't tell very much about that. He was pretty sick and more or less delirious at that time.

Q. How long did that delirious condition remain?

A. About six or seven days.

Q. And state how many ribs were involved in the fracture or breaking.

A. As near as I could make out, there was three fractured ribs, two of them in front and one back.

Q. Were any of these three ribs broken in more than one place, or fractured in more than one place?

A. I think not.

Q. Just take each rib, if you can, and tell where the fracture or break was.

A. The sixth and seventh ribs were fractured in front, at what they call the cartilagenous attachment, and the eighth rib was fractured posteriorly.

Q. Now, Doctor, was there any pressure by those broken ribs upon the lungs, in your opinion?

A. Yes, sir, I think there was at the time.

Q. What did that pressure result in?

A. It resulted in the development of pneumonia in a few days.

Q. Anything else?

A. The pneumonia was followed by an abscess of the lung.

Q. State how you know there was an abscess there.

A. About the sixth or seventh day he was there the abscess ruptured into the bronchial tubes and he spit up the pus.

Q. Can you tell the jury,—on those sixth and seventh days, you say it was one of those two different days?

A. It started on the sixth or seventh day; I don't remember just which.

Q. How long did it continue?

A. He was spitting up pus more or less during all the time he was in the hospital. It wasn't entirely cleared up when he left.

Q. During those first two days after it broke, how much pus would you say he spit up during those first two days?

A. I should say at least a quart or a little more.

Q. All together or at several times?

A. Several times.

Q. Just take in two days, how much would you say he spit up?

A. I should judge a quart or a quart and a half.

Q. On each day?

A. That is the entire amount for the first two or three days?

Q. Was this spitting continuous or did it come all of a sudden?

A. Well, it would stop at intervals, and then come quite an amount at a time.

Q. At the first was there any blood in this corrupt matter that was spit out?

A. Well, he spit bloody sputum before this abscess ruptured. *There was no blood mixed with the pus.*

Q. State whether his condition was serious or not serious at the time you examined him.

A. It was pretty serious at that time.

Q. How serious?

A. Well, I didn't think there was a chance of him getting well.

(Pages 103-104).

Q. Isn't the man in a fine physical condition for a man of his age at this time, Doctor?

A. He has got a good shoulder for the injury he received at the time.

Q. That is, the broken part you spoke of?

A. Yes, but he has less mobility of the shoulder joint at the present time.

Q. He could get his arm up over the head, could he not?

A. Yes, but not easily.

Q. Didn't he take his shirt off and show the mobility of the shoulder?

A. He took it mostly off with his left arm though.

DR. MCCARTHY:

(Pages 164-166).

A. Well, I made an examination of Mr. Chamberlain in the presence of Dr. Platt, at his room in the hotel here, and I stripped him and examined him, his general physical condition. His eyes, and his chest, and his heart, and lungs, and abdomen, and his nervous system, reflexes, his joints, all except the urinary examination; I didn't examine the kidneys, which Dr. Platt tells me are normal. For a man of his years he is remarkably well preserved. I could find no evidence of any present injury to him. Dr. Platt tells me he had a dislocation of his right shoulder. If he had, the present movements are normal. He can move his shoulder; he took off his shirt and lifted his arms up, in clothing himself, and he did it unconsciously, before I drew his attention to the fact that he had complained of some trouble with his shoulder. There is no crepitation. There is no evidence of any present injury to it. If he did have a dislocation he is entirely recovered from it at this time.

Q. How did you find his lungs, Doctor?

A. In regard to his chest, his lungs, his expansion, or deep breathing, he has got good expansion, three and a half

inches, for a man of his years, which is remarkable; and when he takes a long breath the extent to which the lung descends down is an inch and a half on each side. I marked it out with an indelible pencil on the body, and they are both equal, on the right and left side. I understand he had pneumonia of the right lower lobe. If he had, he is completely recovered. There is no evidence of any adhesion and no crepitation, nothing at the present time that I can discover, and his heart is excellent, his arteries are good; they are as good as in a man of forty. His reflexes are good, and I see no reason why the man isn't in very good, perfect condition for a man of his age. He is much better than most men are at fifty.

Cross Examination;

By Mr. Corkery:

Q. For a man of his age then you say he is in perfect condition?

A. For a man of his age he is excellent.

Q. There is no evidence, absolutely no evidence of this injury?

A. Not that I can discover.

Q. You heard Dr. Platt describe the adhesions there, did you, state that there were adhesions there now?

A. Well, I heard Dr. Platt say, but I tried to demonstrate it with Dr. Platt today, *and I can demonstrate it on him now if you will permit me to.*

SPECIFICATION OF ERROR III AND IV.

Where it is apparent to reasonable men that the verdict of a jury is founded in whole or in part upon prejudice, bias, passion, sympathy, or *something other than the evidence in the*

case, a sense of fair dealing and evenhanded justice ought to impel the court to grant a new trial. How can the court in such a case say, or have reason to believe, that a verdict *in any sum whatever* would have been returned against the losing party *had the improper motive* been absent from the minds of the jurors? How can the court say an *unprejudiced and unbiased* jury would not have said *in this case that the defendant* was not guilty of negligence or that the plaintiff was guilty of carelessness or contributory negligence or assumed the risk with full knowledge of the danger? We insist that the record utterly fails to disclose any liability whatever on the part of the defendant in this case, but if we are wrong in that belief then we think it beyond cavil or debate that there is *grave doubt* as to our liability and abundant room for *reasonable, unbiased and unprejudiced minds to differ* as to defendant's liability.

The only basis in the way of evidence of any kind the jury had for estimating and fixing damages was the amount paid out ($150.00) for attendance of a physician and hospital charges, and the pain which plaintiff suffered at the time.

Based upon the standards which have been fixed generally by courts, this could not have, *at the utmost limit,* reasonably exceeded one thousand dollars. But instead of that the jury says $7,500, or *more than seven times any reasonable sum for the injury and suffering proven.*

The court should bear in mind in this case that *physical pain is the only suffering* plaintiff has sustained and that there has been and can be no mental anguish or suffering in this case for the reason that the injury *in no way maims or*

disfigures the plaintiff and he is *in no respect permanently injured.* If plaintiff had made a case entitling him to recover at all he has only shown damage in the amount of his doctor and hospital fees and the *actual physical pain* he suffered, and the evidence shows that he was out of the hospital in *three or four weeks after* the accident occurred. (Trans. p. 53) The record discloses that this was not the kind of an injury which would cause *protracted* or *excruciating pain* and certainly not such that a court or jury would be justified in awarding *damages mounting up into the thousands for.*

We make no contention that the trial court has not the power to require a successful litigant to remit a part of a verdict; *but what we do contend for* in this case is that the amount of the verdict is *so disproportionate* to the amount of *loss, injury* or *damage suffered* as to *instantly* shock a just, fair-minded man's sense of justice and fairness, and at once suggest the though of *prejudice, passion, bias* or some *unfair* and *improper motive* having influenced the minds of the jurors.

We call the court's attention to the decision of some of the courts bearing on this phase of our contention, and most respectfully submit that the reasoning appeals strongly to one's sense of right and fairness in the administration of justice.

It should be remembered in the very outset of our discussion on this branch of the case that the Idaho Statute Sec. 4439 R. C. provides that a new trial may be granted "for any of the following causes:

* * * * * *

> Subd. 5. Excessive damages appearing to have been given under the influence of passion or prejudice."

The statute is identical with the statutes of some of the states from which we shall hereafter cite cases, and especially Montana and Colorado.

In Southern Pacific Co. v. Fitchett (Ariz.), 80 Pac. 359, Fitchett recovered $1000 for injured feelings due to an insult to him by the conductor of the company's train. The trial court denied a new trial providing the plaintiff remitted $600. This was done and the railroad company appealed. The judgment was reversed and a new trial was ordered. The court said:

> "In the case at bar the trial court was of the opinion that more than half of the damages awarded for the appellee's 'injured feelings' were excessive. It was impossible to tell how the jury made up their verdict, but it was evidently not the result of cool and dispassionate consideration. Under these circumstances, we think it was not the province of the court to substitute its own estimate of the damages for that which it had rejected, but that the question of the proper sum to be awarded was one of fact, which should have been submitted to the determination of another jury. We are the more readily led to this view when we consider that the language of our Code is that 'in all cases, both at law and in equity, either party shall have the right to submit all issues of fact to a jury.' Paragraph 1389, Id. Whatever may be the effect of this provision as to equity cases, it was the manifest intention of the Legislature to enact as strongly as words could express its will in favor of the right to have questions of fact left to the determination of the jury.
>
> Other errors are assigned by the appellant, but, as the case will have to be reversed because of the action of the court with respect to the remittitur, and the other questions presented may not arise upon another trial, we deem it unnecessary to discuss them.
>
> The judgment and order appealed from will be reversed, and the cause remanded to the district court for a new trial."

In Chenoweth v. Great Northern Railway Co. (Mont. 1915), 148 Pac. 330, plaintiff had been injured and recovered

a $25,000 verdict. Upon motion for a new trial the court made a conditional order for reduction of the verdict to $15,000. On appeal the judgment was reversed and a new trial was ordered. The court said:

> "It is insisted that the damages are excessive and appear to have been awarded under the influence of passion or prejudice, and with this we agree. Of necessity, there cannot be any hard and fast rule established for determining the maximum compensation to be allowed for a personal injury, and the courts are therefore ever reluctant to interfere. But, while the amount of recovery in the first instance is committed to the wise discretion and unbiased judgment of the jurors, the Codes have provided for a review by the trial and appellate courts. Section 6794 specifies seven grounds, for any one or more of which a new trial may be had. The fifth is: 'Excessive damages, appearing to have been given under the influence of passion or prejudice.' In addition to the remedy by new trial, there is available to the defeated party the right to insist that the amount of the verdict be reduced by the court. This principle has become so firmly established in the jurisprudence of our country that it may well be said to be a part of the American common law. It is a serious question whether a court should ever resort to this latter remedy, except in a case where the amount of the excess can be accounted for by resort to mathematical calculation, based upon some error in the standard adopted by the jury. If the amount of the excess cannot be ascertained by some rational method other than the mere ipse dixit of the court a new trial should be granted, for under our judicial system the rights of parties are submitted to the fair and impartial judgment of jurors, not to their passions or prejudices. Whenever it becomes apparent that either or both of these impulses influenced the amount of a verdict, it is the duty of the court to see that a tribunal created to secure justice is not perverted from its purpose and made an implement of oppression.
>
> The object of section 6794 is to secure to litigants fair and impartial trials of their controversies. The statute is silent with respect to the means by which passion or prejudice may be shown. The courts have gen-

erally contented themselves with a comparison of the amount of the particular verdict with the extent of the injuries shown. The jurors are not permitted to impeach their verdict by disclosing the proceedings in the jury room, from which passion or prejudice might be inferred; (State v. Beesskoven, 34 Mont. 41, 85 Pac. 376) and unless the amount of the verdict, when taken into consideration with the surrounding facts and circumstances ordinarily available to the defeated party, discloses the presence of these elements, then subdivision 5 of Section 6794 is a dead letter. * * * *

If, then, passion and prejudice swayed the jurors, there was not a fair and impartial trial, and instead of reducing the verdict, the lower court should have granted appellant's motion to the end that the case may be once submitted to the unbiased judgment of jurors selected to administer justice between these parties."

In Benge's Adm'r v. Fouts. 174 S. W. 510, the court said:

"It has been repeatedly held by this court that a new trial will be granted because of excessive damages when they appear to be so great as to strike the mind at first blush as having been superinduced by passion or prejudice," and cites numerous cases.

In Belt R. C. v. Charters, 123 Ill. App. 322, the court said:

"We, however, believe that no case can be found in which a judgment, based upon a remittitur, although approved by the trial judge, has been allowed to stand where the reviewing tribunal is satisfied from the record that the verdict rendered was based upon passion or prejudice, or was founded upon a misconception of the evidence. *In such a case the infirmity pervades the entire verdict,* and the remission of the one-half or of any other part of the whole amount *does not free the remaining part from the taint.* The courts will not take money or other property from one and give it to another, except upon a *fair trial in accordance with the forms of law.*"

In Gulf, etc. R. Co. v. Coon, 69 Tex. 730, 7 S. W. 492, in a suit for personal injury to a passenger, the court said:

"The trial judge concluded that it was excessive,

> as he required plaintiff to enter a remittitur of three thousand dollars as a condition to his overruling the motion for a new trial. If the judge was of the opinion the verdict was excessive, he should have granted a new trial. The damages are assessed by the jury; if the verdict is excessive, the judge, in actions like this, had no measure by which to determine how much it is excessive; his attempt to do so is an invasion of the rights of the jury. His only course in such a case is to grant a new trial."

In this case the trial court recognized that the verdict had been made up *at least in part* through *prejudice or passion, or sympathy, or some misapprehension of either the facts or the instructions of the court,* and so the court says in his order on petition for a new trial:

> "After argument by the respective counsel and the court being fully advised in the premises, it is now ordered that the defendant's petition for a new trial be, and the same is, hereby granted unless the plaintiff elects within ten (10) days from this date to accept a reduction of said judgment in the sum of two thousand five hundred ($2,500.00) dollars, together with the interest accrued on that sum from the date of verdict, and to accept judgment in the sum of five thousand ($5,000.00) dollars, and to waive said excess, then and thereupon said petition for a new trial shall be denied."

Under such circumstances the court ought to grant a *new trial* unless the court can say *beyond a doubt that the evidence is so convincing and conclusive that a reasonable, fair* jury could not have returned a verdict in favor of defendant and that had they done so such a verdict would have been set aside by the court.

In Tunnell Mining Co. v. Cooper (Col.), 115 Pac. 901, Ann. Cas. 1912 C 504, the court said:

> "Where the verdict was confessedly so flagrantly excessive, as the remittitur admits it to have been in this

case, *it must be ascribed to prejudice, partiality, passion, or some undue or improper influence or cause, perverting the judgment of the jury*; and to permit any part of it to stand would not be consistent with the preservation of the impartiality, integrity and purity of the trial by jury. * * * * Upon a full consideration of the whole record, and a searching analysis of the entire transaction, the court reached the conclusion that the amount of the verdict alone furnished evidence that it must have been reached through the influence of passion or prejudice."

At page 509, Ann. Cas. 1912 C, the annotators state the rule as follows:

"The general rule is, though there is authority to the contrary, that where an excessive verdict has been rendered through passion or prejudice the error cannot be cured by remittitur, but the defendant is entitled to a new trial as a matter of right."

In the case of DeCelles v. Casey, (1914) 139 Pac. 586, Chief Justice Brantley, speaking for the Supreme Court of Montana said:

"That the verdict was excessive because given under the influence of the passion and prejudice of the jury, however, is clear. The amount to be awarded in this class of cases is lodged in the discretion of the jury; but this discretion is not unlimited or to be exercised arbitrarily. It will not do to say that the jury are free to make the measure of punishment whatever they choose, without any just or reasonable relation to the wrong done.

No definite rule can be declared as to when the court should interfere and when it should not; yet, since a new trial may be ordered when it appears that the jury have acted under the influence of passion and prejudice (Rev. Codes, Sec. 6794), it follows that, when the award is so large that it cannot be accounted for on any other theory and is wholly out of proportion to the wrong done and the cause of it, the conclusion is irresistible that it was measured by the passion and prejudice of the jury, rather than by an estimate made in the exercise of their discretion, and it becomes the duty of the court to set it aside. So far as a general rule on the subject can be